THE NEW LAW HOLDS.

CONSPIRACY TO COMMIT TREASON NOT BAILABLE.

Full Text of the Decision in the Habeas Corpus Case of T. B. Walker.

Argument of Council on the Writ of Habeas Corpus.

From Daily, June 28.)

The writ of habeas corpus issued yesterday morning on behalf of Mr. T. B. Walker, as a test case, was made returnable before the supreme bench at 1:30 P. M. There were but a dozen or so present beside attorneys and newspaper men when Chief Justice Judd and Associate Justices Bickerton and Frear took their seats at twenty-five minutes to 2 o'clock.

After a short delay Judge Hartwell appeared on behalf of the attorney-general and announced he was ready to proceed with the case.

Mr. T. B. Walker was brought into court by Marshal Hitchcock. He was neatly dressed in a gray business suit and sauntered easily to the seat the marshal pointed out near Mr. Creighton's table.

Judge Hartwell read the "papers in the case" and Mr. Creighton arose and said:

May it please your honors: In considering this case there are several points to be discussed. The first and perhaps most important of these is whether or not we are acting and living under a constitution now in force in this country? If so which is it—the constitution of 1887 or the proclamation made by the Provisional government on January 17, 1893? The Provisional government professed to exist as a government de facto, holding in force all law not conflicting with the proclamation. [Read the proclamation.] The Provisional government was organized to secure annexation to the United States of America, and he wished to lay special stress upon the point that the only power the present government has is to preserve the peace and quiet of the islands under the existing laws and that portion of the Constitution of 1887, not conflicting. The government could not commit any act lawfully which conflicted with any constitutional principle. The rights of personal liberty and the privilege of bail fell under this head.

Chief Justice Judd asked if the Constitution of 1887 granted bail in cases of this class.

Mr. Creighton said no, but set up the plea that the personal liberty of the citizens could not be interfered with. He claimed the liberty of speech was not abridged by the Constitution.

Mr. Hartwell said that as the representative of the attorney-general, he wished to know if Mr. Creighton was right in alleging that personal liberty and free speech had been abridged without offering any proof.

Continuing Mr. Creighton said the old Constitution was still in force. Later he would quote Judge Cooley on constitution law from an article in the Forum. The Provisional government had taken on certain powers which it could not now exceed. This would form the chief basis of his argument. He quoted article 1 of the constitution of 1887, relating to the right of liberty, safety and happiness. This, he claimed, covered the present case and made it bailable. This was certainly so until act 38 was passed by the Provisional government. He held that the discretion placed with the attorney-general on the question of bail, under act 38, was unjust and absurd. He quoted, further, articles 9 and 13 of the constitution, and claimed that they bore upon the case at bar. These provide that all persons, without distinction, shall be entitled to certain rights; the right of bail is one of these and should be granted his client. He held that act 38 applies to political charges. This was deplorable. The attorney-general had admitted this much. Allowing him such discretion in the matter of bail was, putting it very mildly, extremely unfortunate. It would be different if the court decided upon bailable offenses of this nature. But the attorney-general's deciding was altogether different. He was a member of a political cabinet, and was there to judge his political enemies, when it came to a question of bail in their case. Such a course was contrary to the spirit and usage of the American and English constitutions. It should not be sanctioned here. It places the question of bail in the hands of the attorney-general, and takes it out of the power of the court to decide.

He wished to call attention to act 3, section 5, under which he understood the prisoners were held. He also read portions of act 38, which he claimed pretented to amend the law of treason of 1892. This amendatory act was in a peculiar position. He claimed the amendment could not cover offenses which were not in existence at the time the original act was passed.

Another point he had expected to cite was the Herring case, but as this had just been decided by this court, he merely mentioned it in passing.

The fundamental point was, under which constitution are we living? This point must be decided first. If we are not under a constitution then the Provisional government can do anything and pass any act.

He argued that Act 3 contained subject matter which was not included under the title as provided by law. Nowhere in the act was conspiring mentioned. Act 3 therefore does not amend it. The amendatory act is null and void if we are under the constitution of 1887 as he claimed. He pointed out the same defect in other sections amended which were not specified in the title. The act was evidently drawn in haste and by a man not a lawyer. Chapter 28 of the penal code relates to conspiracies, and this case falls under that chapter as a separate charge. The prisoner should therefore be discharged. Section 5 of Act 3 was evidently unnecessary and illegal.

The warrant does not describe any offense and therefore the prisoner should be discharged. He had been arrested under a warrant of arrest and not under a complaint of arrest as required by the law (reads the warrant). To hold a man he claimed, the warrant must be complete in itself which this one was not.

In closing he submitted that the keynote of his position was as to whether we were living under a constitutional government or a despotism. He claimed that we were now under the constitution of 1887 and that the Provisional government could only take its place as far as matters of business were concerned, and that only pending the establishment of closer relations with the United States of America. Therefore a law cannot be passed to put the discretion of issuing bail in one man's hands, no matter who he was. Mr. Creighton again referred to the alleged fact that the attorney-general had more power than the Czar of Russia or any other potentate on earth ever had. He submitted that Act 3 was invalid and the warrant defective. He claimed that Act 38 was also invalid and therefore the prisoner should be admitted to bail.

Judge Hartwell, for the government, said it was of no importance to use strong language in the case at bar where the facts and the facts alone were to be considered. In effect, the counsel claimed that the Provisional government has no legislative power; that its functions are merely to keep the peace, pending annexation, where it did not come into conflict with the monarchy. Such was the bald statement, and it was an absurd one.

When has it before been said that the points raised by counsel excluded the legislative function of the present government? He wished to emphasize the fact that in the history of constitutions not one could be found that limited constitutional principles. The executive and advisory councils of the Provisional government had otherwise ordered, as their acts proved, especially in the matter of treason. What could the prisoners at the bar complain of, when the penalty for treason had been made lighter under the amendatory act mentioned by counsel? The old law did not even allow of bail; now it was discretionary.

The language of the learned counsel which referred to the Czar of Russia was clearly not applicable to the present cases or the government. The statements made were not facts. In this case the legislative function has been properly and legally established and the new government has the sworn support of the attorneys of this court. It is the government de facto and it stands in law, all that can be said to the contrary notwithstanding.

As to the subject of bail it was as old as English law. To show that discretionary bail has been a rule in English history he cited and read the common law of England.

The suggestion that there was politics in the present case had nothing whatever to do with the form and functions of the present government under which we live and these cases are brought. The assertion that politics had anything to do with the matter was preposterous—the very name was a misnomer in the present case.

As to Judge Cooley's article in the Forum magazine, read by the learned counsel, there was little to say. He had admired Judge Cooley's law works and held him in high esteem as an exponent of constitutional law where he was posted on the facts which formed the premise of his argument, but in this case he denied Judge Cooley's premise—his facts relating to the constitutional question in Hawaii were not sound—were not true. Others than Judge Cooley had read constitutional law, had made it a study, and differed from Judge Cooley. He especially disagreed with the learned judge on the power of the United States to annex, as did many others. Judge Cooley's views were unfortunately not sustained by any other jurist in the United States. They had not been sustained in the thorough discussion of the question which had lately taken place in the United States senate. But whether Judge Cooley was right or wrong, has nothing whatever to do with the legal and constitutional functions of the Hawaiian government. The learned judge was evidently not well informed on the conditions upon which the present question turns.

The statement of counsel that the Provisional government was not carried on in the interests of the common good, had no application whatever, that he could see, to the legal phases involved in the case at bar.

In a sense every charge of treason and conspiracy was a political charge, but in this case there was no special application of such charge.

He then referred to the legal process in the present case and pointed out that the return was legally good. He held that the prisoners were practically still before the district court and would remain so until next Wednesday, when the cases come up for trial.

Mr. Creighton made a short reply, going over portions of his former remarks. He cited the Ho Fon case and claimed that the present warrant was insufficient, because it specified no offense. He read extracts from Judge Cooley's article, which, he claimed, sustained his view of the case.

Judge Hartwell said he did not understand that the article went so far as to exclude the legislative functions of the Provisional government. He claimed that Hawaii was under the authority of the Provisional government. A citizen here had the same and as great rights as any Englishman in the United Kingdom.

Mr. Creighton claimed that the Provisional government had no right to fly in the face of the constitution.

After a short consultation the court announced that owing to the importance of the case judgment would be reserved and the prisoner remanded until further order of the court.

IN THE SUPREME COURT OF THE HAWIIAN ISLANDS.

JUNE TERM, 1893.

In the Matter of the Application of John F. Bowler on behalf of T. B. Walker, for a Writ of Habeas Corpus.

(Before JUDD, C. J., BICKERTON and FREAR, J. J.)

OPINION OF THE COURT BY FREAR, J.

The prisoner is held by the marshal under a warrant of arrest issued by the district magistrate of Honolulu, in the usual form, commanding the marshal to arrest the prisoner and two others "accused of the crime of conspiracy as in the foregoing affidavit." The affidavit is that of E. G. Hitchcock and is in the usual form upon the same sheet of paper and just above the warrant of arrest, the affiant swearing that the defendant and said others, naming them, "at said Honolulu within three months last past were guilty of the crime of conspiracy, by maliciously and treasonably conspiring and concerting together, and conspiring and concerting with others to the affiant unknown to overthrow, and put down, and destroy by force the Provisional Government of the Hawiian Islands, and to levy war against said Provisional government, and to oppose by force the authority of and by force to seize, take and possess certain property of said government, to wit, the government building, now occupied by the executive council of said government, contrary to the authority of the same," using substantially the language of section 5, act 3, of the Provisional government, being an act "to amend chapter 6 of the penal code, relating to treason."

Counsel for the prisoner contends that the prisoner should be discharged, because (1) the executive and advisory councils of the Provisional government had no power to pass act 3 prior to the passage of act 4, which provided among other things that the two councils should act jointly in the exercise of general legislative powers; and (2) act 3 is void under article 77 of the constitution of 1887, which provides that "every law shall embrace but one object, and that shall be expressed in its title," inasmuch as the title of act 3 relates to treason only, while section 5 relates to conspiracy, and sections 6 and 7 to other offenses; and (3) because the warrant does not set forth with sufficient particularity the offense for which the defendant was arrested.

The first of these points is res adjudicata. This court has held that the executive and advisory councils possess general legislative power by virtue of the proclamation of January 17, 1893, and not by virtue of act 4. In re Sheldon, decided March 31, 1893; Provisional government vs. Herring, decided June 27, 1893.

As to the second point, the reason for requiring that "every law shall embrace but one object, and that shall be expressed in its title," is, as expressed in Article 77 itself of the Constitution, "to avoid improper influences which may result from intermixing in one and the same act, such things as have no proper relation to each other." The improper results to be avoided are, principally, "hodge podge," or "log-rolling" legislation, surprise or fraud upon the legislature, and concealment of the subjects of legislation from the people: Hyman Bros. vs. Kapena, 7 Haw. 76. The evil producing these results is the intermixing of such things as have "no proper relation to each other." If, therefore, looking at the reason stated in Article 77 itself, the things covered by the law have a proper relation to each other and these are fairly well embraced in one object, however general, and expressed in the title, it is sufficient. This provision of the Constitution should be liberally construed. To construe it strictly would, by hampering legislation, cause as great evil in one direction as was intended to be prevented in the other direction. Says Judge Cooley (Const. Lim., pp. 144, 146):

"The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. * * * "The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it."

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"There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted."

The courts of California and Ohio even go so far (too far, we think) as to hold that such provisions of the constitution are merely directory and not mandatory at all. Washington vs. Murray, 4 Cal., 388; Pim. vs. Nicholson, 6 Oh. St. 177. In O'Leary vs. Cook Co., 28 Ill., 534, cited with approval by Judge Cooley, it was held that a clause prohibiting the sale of ardent spirits within four miles of a college was so related to the primary object of an act incorporating the college as to be properly included within it.

It is unnecessary to consider Sections 6 and 7 of Act 5, for, even if they are not fairly within the object of the Act as expressed in its title, that would not affect the constitutionality of the rest of the act. Cooley Const. Lim., p. 148. There can be no question that the offense described in Section 5, under which the prisoner is charged, is properly related to treason. Section 1 provides that persons who levy war against the government, or adhere to its enemies, are guilty of treason. Section 2 provides the penalty for treason. Section 3 relates to the evidence necessary for conviction. Section 4 provides for the punishment of those who, having knowledge of the commission of treason, conceal it. Section 5 provides for the punishment of those who conspire to levy war, etc., against the government. The offenses described in Sections 1, 4 and 5 clearly are all closely related to each other. They are all offenses of a treasonable nature—offenses directed against the existence of the government—and are most properly joined in the same act, as much so as murder and manslaughter, and even assault and battery, might be properly united under one act. Further, for aught that appears, the offense set forth in Section 5 may be considered treason itself as much so as the offense set forth in Section 1. Section 5 merely provides that those who do certain things therein specified shall be punished in a certain way, and while from one part of the description of the offense it might be called conspiracy, yet from the rest of the description it might just as well be called treason. No name is given to the offense in the section itself. The offense may be either treason or conspiracy, just as certain acts may amount to either murder or manslaughter. There is nothing in the nature of treason to confine it to the acts mentioned in Section 1. Under English statutes a great many other acts have been made treason. It is a common form of the penal statute to provide that if a person does certain acts he shall suffer a certain punishment, without giving in terms any specific name to the offense. Chapter 6 of the Penal Code, entitled "Treason," in Section 10—like Section 4 of Act 5 of the Provisional government—provides for the punishment of persons who, having knowledge of the commission of treason, conceal it. Being of the opinion that Act 3, so far as Section 5 is concerned, is not in conflict with Article 77 of the Constitution of 1887, it will be unnecessary for us to say whether that article is still in force, or whether it has been or can be repealed by implication.

As to the point that the arrest was illegal because the warrant does not fully describe the offense of which the accused is charged, it is sufficient to say that the offense is described in the warrant by reference to the affidavit on the same page of the document, and that the affidavit sets forth the offense fully and substantially in the words of the statute. The affidavit is part of the warrant. The description of the offense need not be in any particular part of the warrant.

But counsel further contends that if the prisoner cannot be discharged he ought at least to be admitted to bail. Act 38 of the Provisional goveonment provides that in cases of arrest for the offense for which the prisoner is arrested in the present case, bail should not be allowed without the consent of the attorney-general. The argument is that to refuse bail in cases of this kind is contrary to constitutional principles in general, and more particularly to articles 1 and 9 of the constitution of 1887, relating to liberty. We are not aware that the right to bail has ever been held to be secured by the general provisions relating to the right of liberty under any constitution. The constitutions of most of the United States provide that persons shall, before conviction, be admitted to bail in all but certain excepted cases, the exception most generally being confined to capital cases. Stimson, Am., St. Law., section 122. The constitution of 1887 contains no similar provision. In the absence of such constitutional provision, bail is wholly a matter of statutory regulation. This appears clearly from the history of bail in England. 1 Stephen, His. Cr. Law of Eng., 233 et seq. Nor is the granting or refusing of bail a matter to be exercised by judicial officers only. In England for centuries "the sheriff was the local representative of the crown, and in particular he was at the head of all the executive part of the administration of criminal justice. In that capacity he arrested and imprisoned suspected persons, and, if he thought proper, admitted them to bail." Ib., 234. It is competent in the absence of constitutional provision to the contrary for the legislature to provide that no bail shall be allowed at all, and, of course, that it shall not be allowed without the consent of any particular officer. It is not for us to inquire into the policy or wisdom of such a law. That rests solely with the legislative body.

It is further urged that since Section 9 of Act 3 in terms repeals ch. 6 of the Penal Code, Act 3 itself which is by its title only an amendment of ch. 6 of the Penal Code, must also be repealed. If this were so, the repealing section 9 would also be repealed, that is, it would repeal itself (which would be absurd). And if it were itself of no effect then it could not repeal ch. 6 of the Penal Code (which would also be absurd). It would be to argue in a circle. The argument would be as follows: Section 9 repeals Ch. 6, and therefore Act 3, and therefore section 9, and therefore not ch. 6, which is contradictory to the first proposition. It was the manifest intention of the legislative body to amend the law relating to treason, by substituting Act 3 for ch. 6 of the Penal Code. To sustain counsel's views would be to repeal the entire law relating to treason, which would be as far as possible from the manifest intention of the legislative body. Taking the whole law together, it may well stand, although carelessly drafted. Where an amendment is intended to take the place of a preceding act it impliedly repeals it. So where the act is amended "so as to read" in a prescribed way. Endlich, interpretation of statutes, sections 195, 196. If an amendment can repeal the preceding act by implication, and yet itself stand, certainly it can also stand where the preceding act is expressly repealed.

"There is the strongest kind of presumtion against the existence of that species of absurdity in the intention of the legislature which would consist in a design to defeat its own object. Yet it not infrequently occurs that one portion or provision of a statute, if literally or even naturally construed, would practically nullify the whole, or some material portion of the remainder of the act, with the effect of defeating its obvious purpose. In cases of this description it is a settled rule of construction, flowing from the obvious absurdity of any other, that such an interpretation shall if possible be placed upon the statute, *ut magis valeat quam pereat.*

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"A declaration in the last section of an act that all acts or parts of acts relating to the subject matter thereof should be repealed from and after the the time when the act should take affect, would not be construed as a repeal of that act, but of all others on the same subject matter." Ib., section 265. The repealing section need not be referred to in the title of the act. Cooley, Const. Lim. 145.

It appearing that T. B. Walker, in whose behalf the petition is made, is held under a valid warrant of arrest, issued by competent authority, for an offense which is not bailable under a constitutional law, he is hereby remanded to the custody of the Marshal.

C. CREIGHTON, for petitioner.
A. S. HARTWELL, for respondent.
Honolulu, June 28, 1893.

WORTH WINNING.

List of Prizes for the Citizens' Match, July 4, 1893.

The fifteenth semi-annual match of the Hawaiian rifle association will be held on the morning of the 4th July. In addition to the trophies for the regular matches, the following list of prizes will be awarded to the winners of the citizens' match:

Col. Claus Spreckels, $50.
Hawaiian Carriage Manufacturing Co., $5.
Hollinger's Shoeing Shop, $5.
Union Feed Co., $5.
Wilder & Co., $5.
M. Phillips & Co., $5.
Inter-island Steam Navigation Co., $10.
Alex. Young, $5.
A. B. C., $5.
E. S. Cunha, $2.50.
F. A. Schaefer & Co., $5.
Henry Davis & Co., box of tea.
Hawaiian Hardware Co., hanging lamp.
Gonsalves & Co., ham.
T. H. Davies & Co., vase.
M. S. Grinbaum & Co., banjo ($20).
M. W. McChesney & Sons, 100 lbs. best soap.
J. F. Colburn & Co., bag of New Zealand oats.
California Feed Co., bale of hay.
W. S. Luce, goods ($7).
S. Roth, goods for pair of pants.
Pacific Hardware Co., picture.
J. S. Martin, pair of trousers.
Lewers & Cooke, roll of matting ($12).
W. F. Reynolds, silver bracelet.
E. O. Hall & Son, silverware ($15).
H. F. Wichman.
M. McInerny, straw hat.
J. T. & H. Waterhouse, glassware ($10).
Manufacturers' Shoe Co., pair of shoes ($5).
Hawaiian News Co., album ($6).
Peacock & Co., keg of wine.
C. W. Ashford.
J. Emmeluth & Co., goods ($5).
Hackfeld & Co.
Castle & Cooke, set of carvers ($10).
Wenner & Co.
Henry May & Co., box of tea.
Egan & Gunn, photograph album.
Benson, Smith & Co., dozen perfume.
King Brothers.
Hawaiian Star Co., 1 year's subscription Star.
Hawaiian Gazette Co., 1 year's subscription Advertiser.

A Boy Equals a World Record.

OAKLAND, June 14.—Dana Thompson, the wonderful boy swimmer, is continuing his work at record smashing. At the Piedmont baths this afternoon he swam a half mile, clad in a heavy woollen bathing suit, in 13 minutes 43 seconds, which equals the world's record for that distance. What makes this feat most remarkable is the fact that this record was originally made by a man unincumbered by a bathing suit. Some days ago, at the Terrace baths, in Alameda, young Thompson cut several seconds off another record by swimming the quarter mile in 6 minutes 50 seconds.